SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1411

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,

vs.

ALBERT J. SCHORSCH REALTY CO., INC., ET AL.,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, AS TRUSTEE UNDER TRUST No. 11-1030, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO EXCHANGE NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST No. 15166; AND LA SALLE NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER TRUST No. 35232, SUCCESSOR IN INTEREST TO JOHN PRZYWARA AND JOSEPHINE PRZYWARA, HIS WIFE,

Petitioners,

Consolidated With

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,

vs.

JOHN PRZYWARA, ET AL.,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, AS TRUSTEE UNDER TRUST No. 11-1030, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO EXCHANGE NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST No. 15166; AND LA SALLE NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER TRUST No. 35232, SUCCESSOR IN INTEREST TO JOHN PRZYWARA AND JOSEPHINE PRZYWARA, HIS WIFE,

Petitioners.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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No. 51710

IN THE APPELLATE COURT OF ILLINOIS,

First District.

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,
Plaintiff-Appellee,

vs.

ALBERT J. SCHORSCH REALTY CO., INC., et al.,
Defendants,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, as Trustee under Trust No. 11-1036, individually and as Successor in Interest to Exchange National Bank of Chicago as Trustee under Trust No. 15166; and LASALLE NATIONAL BANK OF CHICAGO, as Trustee under Trust No. 35232, Successor in Interest to John Przywara and Josephine Przywara, his wife,
Defendants-Appellants,

Consolidated With

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,
Plaintiff-Appellee,

vs.

JOHN PRZYWARA, et al.,
Defendants,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, as Trustee under Trust No. 11-1030, individually and as Successor in Interest to Exchange National Bank of Chicago as Trustee under Trust No. 15166; and LASALLE NATIONAL BANK OF CHICAGO, as Trustee under Trust No. 35232, Successor in Interest to John Przywara and Josephine Przywara, his wife,
Defendants-Appellants.

Appeal from the Circuit Court of Cook County.

Honorable Charles J. Dougherty, Judge Presiding.

Opinion of the Appellate Court—Case No. 51710.

MR. JUSTICE DRUCKER Delivered the Opinion of the Court.

Petitioner instituted condemnation proceedings on March 4, 1965 (Circuit Court No. 65 L 7227) for five parcels of land. On July 14, 1965, another petition was filed in the same case seeking nine and one-half acres of unsubdivided land and one acre of subdivided property which consisted of eight lots designated as Parcel E or Parcel 4. On July 14, 1965, another petition was filed in a new case (Circuit Court No. 65 L 20763) seeking the same property. In that case a change of venue was granted November 3, 1965, as to Parcel E and the case reassigned for separate trial as to Parcel E. Thereafter the cases were consolidated.

The instant case involved Parcels A, B, C and D. Petitioner has appealed the jury's awards. Defendants Stanley and Irene Rusek, owners of Parcel A, have asked us to affirm the judgment relating to Parcel A. Petitioner has also indicated its willingness to affirm this portion of the judgment and we affirm the judgment as to Parcel A.

Defendants John and Josephine Przywara, National Bank of Albany Park and Exchange National Bank of Chicago have taken cross-appeals from the denial of their traverses and motions to dismiss and have also appealed the jury's awards as to Parcels B, C and D. In their cross-appeals defendants argued that they were denied a hearing on their traverses and motions to dismiss the petitioner's complaint. Defendant National Bank of Albany Park filed a traverse and motion to dismiss simultaneously with its first appearance in the case on February 9, 1966. It alleged that petitioner had failed to satisfy certain statutory preconditions to the institution of condemnation proceedings and also alleged certain facts which it claimed made this taking illegal as an abuse of govern-

mental discretion. On February 11 petitioner's motion to strike National Bank of Albany Park's motion to dismiss was filed and granted. The motion to strike stated:

> Said defendant's traverse filed without leave of Court eleven and one-half months after condemnation proceedings were instituted and said defendant was served with summons and one month after this Court denied identical traverse in this cause filed by the same attorneys is an improper attempt to have this Court try the same question over and over again contrary to the well established law in Illinois.

The Exchange National Bank sought leave to file a similar traverse and motion to dismiss on February 10, 1966, but leave was denied it on the same day. No reason for denying leave appears in the record.

The general rule for filing motions to dismiss is stated in *Board of Education* v. *City of Chicago,* 402 Ill. 291, at page 298:

> It is also contended by appellee that before appellant is entitled to relief in eminent domain proceedings, a hearing must be had on its motion to dismiss and traverse. This court has held that such procedure is the proper method of reaching and deciding the issues as to the right of a petitioner to have condemnation in a particular case. The only issue to be tried by the jury is the amount of compensation to be awarded. A defendant has a right to contest the petitioner's right to condemn, which he may do by motion to dismiss, and having done so the burden is on the petitioner to maintain its right by proper proof.

Petitioner, however, argues here and in its motion to strike that the instant case is controlled by *Chicago Land Clearance Commission* v. *Rosenau,* 10 Ill. 2d 501. In that case condemnation proceedings were instituted on April 2, 1953, and defendant appeared through counsel on May 14, 1953. On January 26, 1954, the trial judge ordered that all parties who wished to contest petitioner's right to condemn do so

within seven days. Defendant's lawyer informed the court that it did not wish to do so. On June 13, 1955, more than two years after the initiation of the proceedings, defendant changed its position and sought to contest the condemnation. The Supreme Court upheld the trial court's denial of leave to file a traverse based on failure to comply with the deadline of the order issued on January 26, 1954, saying at page 506:

> If all defendants in a condemnation proceeding are required to file their traverses or motions to dismiss within a specified time, then the trial court can control its calendar and try all those traverses which raise the same question and dispose of them on one hearing. On the other hand, if each defendant is to have the right to file his traverse or motion to dismiss whenever he sees fit to do so, then the trial court will be obliged to try the very same question over and over again. This would compound the evils that the crowded court calendars in Cook County already present.

The petition in the instant case was filed on March 4, 1965; an additional petition enlarging the area sought to be taken was filed in July 1965. No further action was taken by petitioner until January 27, 1966, when petitioner moved to consolidate the cases and they were ordered removed from the calendar. The record does not disclose that a trial date was set. (Appellee claims that February 21 was set as the trial date.) On February 9 National Bank of Albany Park filed its appearance and motion to dismiss. On February 10 Exchange National Bank of Chicago, as Trustee, filed its motion for leave to file its motion to dismiss. No order setting a deadline for filing traverses was ever sought or entered. We cannot find that defendants' rights to contest petitioner's right to condemn should have been denied under these circumstances. *Rosenau* is clearly distinguishable on the facts.

Petitioner, however, points out that the parties in this

case sought to file traverses and motions to dismiss identical to that denied in the proceeding as to Parcel E. (Parcel E was tried separately by a different trial judge following the granting of a change of venue.) Petitioner argues that since the same lawyers represented the owners of Parcel E as well as the parties who filed the motions to dismiss and the traverses in this case and the motions to dismiss alleged identical grounds, the parties in the instant case are barred by the decision reached by the judge in the proceedings as to Parcel E one month before their own motions were filed. We know of no "well established law in Illinois" which prevents owners of property from challenging the condemnor's right to proceed simply because they make the same arguments through the same attorneys as were made by another party in a different suit tried by a different judge. Certainly the fact that different properties and different parties were involved prevents the application of the principle of *res adjudicata.* We believe that defendants were entitled to a hearing on the petitioner's right to condemn. Therefore the judgments as to Parcels B, C and D are reversed and the cause remanded with directions to vacate the order striking the traverse and motion to dismiss of National Bank of Albany Park, to vacate the order denying leave to Exchange National Bank to file its traverse and motion to dismiss and to conduct such proceedings as may be required. *City of Kewanee* v. *Puskar,* 308 Ill. 167.

Both petitioner and defendant have asserted errors entitling them to a new trial on the questions relating to just compensation. In view of our decision we find it unnecessary to consider these alleged errors.

AFFIRMED AS TO PARCEL A.
REVERSED AND REMANDED WITH DIRECTIONS AS TO PARCELS B, C AND D.

McCORMICK, *P. J.*, and ENGLISH, *J.*, concur.

No. 54685

IN THE APPELLATE COURT OF ILLINOIS,

First District.

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,
Plaintiff-Appellee,
vs.
ALBERT J. SCHORSCH REALTY CO., INC., et al.,
Defendants,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, as Trustee under Trust No. 11-1030, individually and as Successor in Interest to Exchange National Bank of Chicago as Trustee under Trust No. 15166; and LASALLE NATIONAL BANK OF CHICAGO, as Trustee under Trust No. 35232, Successor in Interest to John Przywara and Josephine Przywara, his wife,
Defendants-Appellants,

Consolidated With

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,
Plaintiff-Appellee,
vs.
JOHN PRZYWARA, et al.,
Defendants,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, as Trustee under Trust No. 11-1030, individually and as Successor in Interest to Exchange National Bank of Chicago as Trustee under Trust No. 15166; and LASALLE NATIONAL BANK OF CHICAGO, as Trustee under Trust No. 35232, Successor in Interest to John Przywara and Josephine Przywara, his wife,
Defendants-Appellants.

Appeal from the Circuit Court of Cook County.

Honorable Edward J. Egan, Judge Presiding.

Opinion of the Appellate Court—Case No. 54685.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an eminent domain proceeding commenced in 1965 by the Board of Education of the City of Chicago to acquire for school purposes five parcels of land referred to as Parcels A, B, C, D and E. The instant appeal concerns Parcels B, C and D, which consist of approximately nine and one-half acres of vacant land except for an old frame house. These three parcels were the subject of a prior appeal in which this court reversed judgment in favor of plaintiff and remanded the cause "with directions to vacate the order striking the traverse and motion to dismiss of National Bank of Albany Park, to vacate the order denying leave to Exchange National Bank to file its traverse and motion to dismiss and conduct such proceedings as may be required." 95 Ill. App. 2d 258, 263.

The mandate of the Appellate Court in the prior appeal was filed in the trial court on October 22, 1968. On remand and after hearing evidence, the trial court (1) overruled and denied defendants' motions to dismiss; (2) denied leave to defendants to file a petition to establish a new date to fix the valuation of the property involved; and (3) denied leave to defendant National Bank of Albany Park to file a cross petition for damages to a remaining five-acre tract immediately north of and contiguous to Parcel D of these proceedings. In a valuation trial a jury verdict fixed the value of Parcel B at $165,000, C at $92,000 and D at $92,000. Judgments were entered on the verdict.

Defendants appeal from orders striking portions of the motions to dismiss, overruling and denying the motions to dismiss, denying leave to file certain petitions, and from

the verdict and judgments entered thereon. On appeal defendants contend they did not receive a proper hearing on their motions which were either dismissed or denied. Also, because of prejudicial trial errors, they did not receive a fair valuation trial.

Initially considered is defendants' contention that the trial court erred in striking their motions to dismiss and violated their right to due process of law. The motions alleged the following:

> "1. Plaintiff failed to prepare any preliminary plans for the construction of a school or to decide on what type of school it would construct on the proposed site.
>
> 2. Plaintiff, prior to the initiation of the instant suit, began a prior suit seeking to condemn a site slightly less than three acres of land in the immediate vicinity which was subsequently dismissed. Plaintiff also had initiated a suit prior to this instant suit, seeking to condemn a site of approximately 19 acres, also in the immediate vicinity. This second suit also was dismissed by the plaintiff prior to beginning this suit. By reason of the premises the attempt to take herein demonstrates an attempt to take an excessive amount of property.
>
> 3. No reports, surveys, or other basis for a recommendation for the taking, or reason why plaintiff should proceed differently in this suit from its proceedings in the two suits heretofore referred to, appear anywhere of record.
>
> 4. Plaintiff has failed to comply with an essential condition precedent to the filing of its Petition herein in that it has failed to comply with the provisions of Section 11-12-4 of Chapter 24 of the Illinois Statutes.
>
> 5. Since plaintiff relies on the exceptions contained in Section 42 of Chapter 102 of the Illinois Revised Statutes relating to Meetings of Public Agencies to keep from the record any information which enters into its purported exercise of discretion to acquire the

real estate here involved, their failure to comply with the duties of the statute requiring their reference to the Chicago Plan Commission constitutes an abuse of power and prevents any reasoned decision or check or balance on the administrative actions of the Board of Education as plaintiff herein. It further prevents any review which might serve to uncover issues which were ignored or inadequately treated by the Board of Education; and refuses to this defendant the constitutional and statutory protections intended by the Illinois Legislature in the Plan Commission Statute. As a result thereof, this defendant is deprived of due process in that there is a complete absence of any review of plaintiff's decision to take this property."

Thereafter, plaintiff filed a motion to strike the motions to dismiss on the ground that the motions were legally insufficient. On December 20, 1968, the trial court entered an order which included directions to plaintiff to respond to certain paragraphs of the provisions of defendants' Request to Admit Facts, which had been served on plaintiff on December 16, 1968. On January 3, 1969, and after a hearing, the court entered an order striking paragraphs 1, 3, 4 and 5 of defendants' motions. On January 6, 1969, the remaining portions of defendants' motions to dismiss were denied, after hearing the testimony of witnesses and considering various resolutions of the Board of Education relating to the acquisition, the responses to the Request to Admit Facts which related to the various sites involved, and arguments of counsel.

Defendants contend that the hearing on their motion to dismiss did not fulfill the minimal requirements of due process of law. Defendants argue that "plaintiff in seeking to condemn this property has failed to show any use of discretion in making its determination and additionally abused its discretion in taking an excessive amount of property." They assert that the reasoning of plaintiff's

motion to strike was that defendants had no right to inquire into plaintiff's basis for its exercise of eminent domain and that the attempts at discovery by defendants was inhibited by this position, especially as to the question of why the Board of Education changed at least the size of its site on five occasions.

Plaintiff contends that the selection and acquisition of the public school site here involved was within the discretion of the Board of Education. It asserts that it is a long established rule of condemnation law that the exercise of the power to condemn is a legislative and not a judicial question, and the determination by the Board of Education to acquire the subject school site should not be disturbed by the court.

After examining the arguments and authorities cited by both sides, we conclude that an extended discussion would unnecessarily lengthen this opinion. The guidelines to be used here are sufficiently set forth in *City of Chicago* v. *Vaccarro,* 408 Ill. 587, 97 N. E. 2d 766 (1951); *Cafeteria Workers* v. *McElroy,* 367 U. S. 886 (1961); and an article by Chief Justice Traynor of the California Supreme Court in 17 Vanderbilt Law Review 109.

In *City of Chicago* v. *Vaccarro,* it is stated (p. 596):

> "This court has held in an unbroken line of decisions that where the right to condemn exists, and the property is subject to the right of eminent domain and is being condemned for a public use, and the right to condemn is not being abused, courts cannot deny the right to condemn on the ground that the exercise of the power is unnecessary or not expedient, as the determination of that question devolves upon the legislative branch of the government and is a question which the judicial branch of the government cannot determine; and that in such cases courts may only rightfully determine whether a petitioner has the power to exercise the right of eminent domain, whether the

> property is subject to the right of eminent domain and is being taken for a public use, whether the power is being abused, as by the taking of an excessive amount of property, and other kindred questions which do not involve a determination of the necessity or expediency of the taking of the lands sought to be condemned."

And at page 597:

> "The general rule is that where the legislature has delegated to a corporation the authority to exercise the power of eminent domain, the corporation has also the authority to decide on the necessity for exercising the right, and its decision will be conclusive in the absence of a clear abuse of the power granted. * * * An abuse of such power, however, will not be tolerated, and if no necessity for its exercise exists, or if it appears that the quantity of the property sought to be taken is grossly in excess of the amount necessary for the public use, the court will not permit the land to be taken."

In *Cafeteria Workers* v. *McElroy,* it was stated (p. 895):

> "As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. Where it has been possible to characterize that private interest (perhaps in oversimplification) as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required."

Justice Traynor in his article remarked (p. 117):

> "One is moved to add that these are basic concerns of a court in the review of decisions of administrative agencies. A person has not had a fair hearing if the one in authority, given discretion to adjudge the case in the ample terms of a general policy, has exercised

his discretionary power not with the realistic appropriateness that is the very justification of such power, but with such harsh inappropriateness as to mock the meaning of discretion. A court reviewing an alleged abuse of discretion, and finding a prima facie case of arbitrariness, must be alert to ascertain whether or not there emerges from the record some reasonable explanation for the administrative decision. We cannot take it for granted that because an authority is, he thinks. The thought process, or the absence thereof, of the one in authority has more than once been the key to determining the issue of due process in administrative proceedings."

Summarized, the motions to dismiss were substantially based on the following grounds: (1) preliminary plans for construction for a school or type of school were not made; (2) the taking was excessive; (3) no reports, surveys, or other basis why plaintiff should proceed in this suit differently than in the two suits it heretofore dismissed appear of record; (4) plaintiff did not consult with the Chicago Plan Commission; and (5) plaintiff has kept from the record information which entered into its exercise of discretion in seeking to acquire the school site.

After examining this record, we find that in the instant case the filing of the resolution of the Board of Education to acquire the subject property was sufficient. No plans, reports or surveys were required to be prepared as a condition precedent to plaintiff's exercise of the power to acquire a school site. See 26 Am. Jur. 2d, Eminent Domain, § 117; *Village of Depue* v. *Banschbach,* 273 Ill. 574, 113 N. E. 156 (1916). The dismissal of two previous suits by plaintiff was not relevant to the determination that the taking was excessive. Plaintiff was not required to consult with or secure the approval of the Chicago Plan Commission. We agree with the remarks of this

court in the first appeal of this cause (95 Ill. App. 2d 264, 279):

> "The statute expressly provides that the plan commission's disapproval does not bar the proposed action. We believe that the statute taken as a whole indicates that the requirement of submission to the plan commission is not mandatory and failure to submit the proposed action to the commission does not bar condemnation."

Furthermore, plaintiff was not required to reveal or record the information or motives that went into its decision. In *Oak Park National Bank* v. *Village of Broadview,* 27 Ill. 2d 151, 188 N. E. 2d 679 (1963), it is said (p. 155):

> "The motives that may have actuated those in authority are not the subject of judicial investigation."

In *Deerfield Park Dist.* v. *Development Corp.,* 22 Ill. 2d 132, 174 N. E. 2d 850 (1961), it is said (p. 140):

> "As we stated in *Ligare* v. *City of Chicago,* 139 Ill. 46, in a condemnation case the purpose for which the power of eminent domain is exercised may be questioned, but 'the motives that may have actuated those in authority are not the subject of judicial investigation.' "

Finally, the trial court did not err in refusing defendants leave to amend their motions to dismiss. Such was a matter for the sound discretion of the trial judge, and there is nothing in this record to show that he abused his discretion. We hold the trial court was correct in striking or denying defendants' motions to dismiss and in so doing defendants' right to due process of law was not violated.

Subsequent to the denial of the motions to dismiss, the court denied leave to defendants to file a petition alleging substantial change in the value of their property and asking

for a new valuation date. Also, the court denied leave to defendant National Bank of Albany Park to file a cross petition alleging damages to its five-acre parcel of property immediately north of and contiguous to Parcel D. The court then set the cause for a valuation trial as of the date of the filing of the condemnation petition in 1965.

At the valuation trial before a jury, the first witness for plaintiff was Charles A. Hodlmair. He had been in the real estate brokerage, sales, management, appraisal and construction business all his life, and was well acquainted with the area in question. He testified that the area of the subject parcels is mostly newly built up, particularly on the south and east, as a single family residential neighborhood, for which it is zoned and best suited.

Hodlmair further testified that the highest and best use of Parcels B, C and D as of July, 1965, was single family residence use. He based his opinion on the character and condition of the property itself, the size of the parcels, the surrounding neighborhood, the single family residence developments surrounding the subject property on three sides, the situation with respect to bringing in sewer and water, the necessary site preparation, the possible uses of the property, the mortgage market possibilities, and the most feasible layout of the lots on these parcels for subdivision purposes, including the development problem with Parcel B caused by the one-half acre taken out for Parcel A. Other difficulties in developing the condemned parcels for use arose from the fact that there was a one street access only, and that Cumberland Avenue at the west is a 40-mile an hour speed limit road. Also, for Parcel B it would be necessary to put in a street with a cul-de-sac or loop in order to get in and out, thereby reducing the amount of land for building use.

Hodlmair's valuation testimony was $85,000 for Parcel B and $58,000 each for Parcels C and D. In arriving at

these figures he took into account the sales price of comparable land known to him, the market, the cost of improving the land and the maximum that would be paid for it on the market after improvement. The vacant property across Cumberland didn't have any particular bearing on his opinion. When asked if he took into account whether there was a reasonable probability of rezoning these three parcels, he stated, "I wouldn't even consider it."

The second valuation witness for plaintiff was Herman O. Walther, who testified that he has been in the real estate business for forty years, and has appraised all kinds of real estate during that time. He testified that in his opinion the highest and best use of the subject parcels as of July 14, 1965, was for single family residence use in keeping with the adjoining developments, all single family residences, and with the zoning to the east, south and north of the property. He valued Parcel B at $125,000 and Parcels C and D at $70,000 each as of the date of July 14, 1965. The facts he took into consideration in arriving at these figures included the location of the property, the transportation, the 200 or so single family homes that adjoined on the northeast, east and south of the subject parcels, the single family zoning and the highest and best use of the subject property, its accessibility to churches, schools, shopping areas, transportation, and his familiarity with the real estate market and his experience in the real estate business.

On cross-examination he testified that it would be highly improbable that Parcels B, C and D could be rezoned. He stated that "assemblage" is a process so that small parcels are made into a larger parcel of land under one ownership, whether through purchase or option. He finally stated that the R-4 zoning across the street had no affect on the subject property.

The third valuation witness for plaintiff was John J.

McNamara, who testified that he has been in the real estate business as a broker and an appraiser for forty-two years. He stated he was familiar with real estate in the vicinity of the subject parcels; that temporary classrooms have been erected south of the subject property at Cumberland and Balmoral, and that the subject parcels were on the east surrounded by a residential development of single family dwellings. He testified that in his opinion the highest and best use of Parcels B, C and D, as of July 14, 1965, would be for development as a single family residential development, based on property that these parcels are surrounded by and that the subject parcels are zoned R-2, single family residence. His opinion of value for Parcel B was $105,000 and $72,000 each for Parcels C and D. In arriving at these figures the elements he considered included the size and shape of the parcels, the use to which they could be put under their present zoning of R-2, and his experience in the real estate business. On cross-examination he testified that he did not take into account the reasonable probability of rezoning the subject parcels because they were strictly R-2 zoning.

Mitchell Kobelinski, a witness for defendants, testified that he was a lawyer and banker and has had extensive experience in assemblage and development of real estate of all types. He identified defendants' Exhibit 1 as a zoning map of the City of Chicago and testified that no rezonings occurred in the area of the subject parcels for the period July 14, 1965, to February 16, 1966, the date of the document. As of July 14, 1965, he owned Parcel C, had an option to purchase Parcel D and owned a five-acre parcel immediately north of D. He had an opinion that the parcels each would be best used for multi-family residential use with the possibility of alternate commercial use along the Cumberland Avenue frontage, and that the value of Parcel B at its highest and best use was between $340,000

and $365,000 and Parcels C and D at their highest and best use was $195,000 to $200,000. His opinion of the values of the subject parcels at their present zoning was $290,000 for Parcel B, and for Parcels C and D each $160,000 to $165,000. The factors he took into account in arriving at his opinions of value included rezoning and a demand for multi-family housing.

On cross-examination Kobelinski testified that he has had an interest in the neighborhood since 1962 when they first bought property there. He was asked what he paid for the five-acre tract immediately north of and contguous to Parcel D, which was objected to. Over this objection he testified that he paid $164,000. On redirect he testified that he did not seek rezoning of Parcel C or the five acres north prior to July 14, 1965, because at that time the last parcel of their assemblage had not been acquired. It was not economically advantageous.

Carl Gardner, a city planning consultant, testified for defendants. He stated that he was familiar with the subject property, and told specifically which areas of influence affected it. He described the established trend in the area toward multiple-family 6, 8 and 12 units and stated that Cumberland Avenue is in no way a zoning barrier. He stated the properties on either side of a given street should be the same use or a comparable use, at least a compatible use. He further stated that assuming that Parcels C and D were assembled with the five-acre tract immediately north, that his opinion of the highest and best use for that site would be a planned residential development under the zoning classification R-4. He also stated that the highest and best use of Parcel B would be the same.

Richard Roppolo testified for defendant that he was a real estate broker and was familiar with the subject property. He was asked to make an appraisal of Parcels B,

C and D, and his opinion was that the highest and best use of the property was a combination of commercial and multiple. He valued Parcel B at its highest and best use as $460,000 for what might be commercial and $300,000 for the multiple. His opinion of Parcels C and D at their highest and best use was $250,000. The values of the parcels at their present zoning of R-2 was $273,000 for Parcel B and $141,000 each for Parcels C and D.

Vincent Oliva testified for defendants as to the sale of allegedly similar property. The deal was closed and the money paid subsequent to July 14, 1965. However, upon objection by plaintiff, the court did not admit the sale into evidence.

Albert Schorsch, Jr., testified for defendants that he was a real estate broker and also a subdivider and builder. His opinion of the highest and best use of each of these parcels would be under general residence zoning, R-4, with apartment units. His opinion of the value of Parcel B at its highest and best use would be $351,200 and $202,000 for Parcels C and D at their highest and best uses. The value of the Parcels at their present zoning was $242,000 for Parcel B and $141,000 each for Parcels C and D. He took into account the upward trend of values of land which has put the market of the property beyond the reach of the single family home developer to a point where it would have to be developed as rental or general residence type property; and that the trend throughout the city has been toward the demand for more apartments.

On cross-examination he stated it would be necessary to get the zoning changed to use this property under R-4 and described the procedures for obtaining a rezoning.

Eugene Kuberski testified for defendants that he is a zoning plan examiner for the Cook County Building Department. He examined the five-acre tract of property in Nor-

wood Park Township at Cumberland Avenue immediately south of Bryn Mawr with regard to the number of residences a person could put on it. As of April, 1962, one residence could be placed on that parcel of property.

Defendants offered into evidence Exhibits 2 through 7, which were zoning ordinances of the City of Chicago relating to specific rezonings in the area covered by the zoning map. The court denied admission to Exhibits 2 through 6 inclusive and admitted Exhibit 7 into evidence. As previously noted, the jury returned a verdict awarding compensation and judgment was entered on the verdict.

Considered next is defendants' contention that they were not afforded a fair valuation trial because of prejudicial rulings of the trial court. They first complain that they were not allowed to present their theory of "assemblage" for the jury's consideration and that this evidence would have greatly shown an increase in value of the subject property. They note that if Parcels C and D were assembled with the five-acre tract near Parcel D, that compact nine-acre parcel would be worth more than the three smaller individual parcels. The record in this regard shows that in November, 1962, the owners of Parcels C and D, Walter and Florence Branda, entered into an option agreement where they gave Mitchell Kobelinski and Ted Szywala or their company an option right to purchase one-half of Parcel C on or before May 1, 1963; the other half of Parcel C on May 1, 1964; one-half of Parcel D on May 1, 1965, and the other half on May 1, 1966. At the time of the filing of the Petition to Condemn, the optionees had acquired the two halves of Parcel C but had not acquired any of Parcel D. The ownership of the parcels at the time of the filing was thus as follows: Parcel B was then owned by John and Josephine Przywara; Parcel C was then owned by the National Bank of Albany Park under Trust 11-1030, whose beneficiaries were Mitchell Kobelin-

ski and Ted Szywala or their company; and Parcel D was then owned by the Exchange National Bank under Trust No. 15166 as trustee, *whose beneficiaries were Walter and Florence Branda.* During the direct examination of Kobelinski, he was questioned concerning his ownership of property in the vicinity of the subject parcels. He testified that he owned Parcel C and "had an option" to purchase Parcel D. A colloquy took place and the witness stated: "I answered two questions, Judge. One I said we had an option to purchase Parcel D and we had title to the rectangle immediately north of Parcel D." The Court: "Okay, objection sustained as to 'had an option to purchase'."

Defendants assert that the trial judge struck the answer "had an option" in such a manner and so out of context that the jury readily may have understood it was to disregard any evidence by the defendants relating to the claim of an option throughout the trial, and that such was prejudicial. They assert that evidence of assemblage would tend to show a greatly increased market value. They also assert that Defendant's Instruction No. 8 concerning the theory of assemblage was improperly refused. Authorities cited include *County of Cook* v. *Holland*, 3 Ill. 2d 36, 119 N. E. 2d 760 (1954), and *Union Electric Power Co.* v. *Sauget*, 1 Ill. 2d 125, 115 N. E. 2d 246 (1953), where it was stated (p. 130):

> "As to the evidence, which must be viewed in the light that its purpose is to establish just compensation for the land, it has long been the rule that parties to a condemnation proceeding have the right to adopt their own theories as to the best and highest use of the land taken and each may introduce evidence without being bound by the theory of the other. * * * Since neither party is bound by the theory of the other, it follows that the court is not limited to admitting evidence which embraces the theory of one party only."

We find that *no prejudicial error was committed by the* trial court in its ruling. Kobelinski was asked the question, "Did you *own* any other real estate in the immediate vicinity of this property?" It was improper for the witness to answer that he *owned* Parcel D, because an option creates no interest in the land. See *Keogh* v. *Peck,* 316 Ill. 318, 328, 147 N. E. 266 (1925).

Also, we find that *defendants were not prevented from presenting their theory of assemblage to the jury.* The record shows that Kobelinski testified that he was part owner of the Ridgeway Construction Company, which owned Parcel C and had an option to purchase Parcel D. Also, defendants' witness Gardner, over objection, was allowed to testify as to the highest and best use of Parcels C and D as being assembled. Finally, it was *not prejudicial error to refuse Defendants' Instruction No. 8. There was no evidence that assemblage of Parcels C and D would affect the value of the parcels.*

Defendant National Bank of Albany Park, as Trustee for Kobelinski and Szywala, next contends that it was erroneously denied leave to file a cross petition and have damages to a remaining five acres immediately north of and contiguous to Parcel D assessed. Defendant bank owned this five-acre tract, but it was not a part of the condemnation proceedings. It notes that defendant National Bank of Albany Park established sufficient rights in the ownership of Parcel D which should have been sufficient to have damages assessed, presumably because it considered all of the parcels together, including the five acres north of Parcel D, more valuable as a single tract. Defendants maintain that they were diligent in attempting to assert their rights and at all times, when proper, asked the court to treat the property as a tract or allow damages to the remainder or both.

In the Eminent Domain Act (Ill. Rev. Stat., Ch. 47, § 1 et seq.), it is provided:

> "11. Cross Petition.] § 11. Any person not made a party may become such by filing his cross petition, setting forth that he is the *owner or has an interest in property,* and which will be taken or damaged by the proposed work; and the rights of such last named petitioner shall thereupon be fully considered and determined." (Emphasis added.)

We find that it was proper to deny leave to defendant National Bank of Albany Park to file its cross petition. In the instant case any possible damage to the five-acre tract north of Parcel D necessarily depended on whether defendant was the "owner or has an interest" in Parcel D. However, as shown previously, at the time of the cross petition defendant merely had an option to purchase Parcel D and did not "own" it. In *City of Chicago* v. *Equitable Life Soc.*, 8 Ill. 2d 341, 134 N. E. 2d 296 (1956), it is stated (p. 348):

> "It is elementary that a mere intention on the part of the owner to put properties to a common use is not sufficient to allow a cross petition in a condemnation action, but such properties must be considered as they existed at the time the proceedings were commenced, * * * and whether or not the cross petition is proper is a question of law which must be decided by the court. * * * Under the facts and circumstances of this case, we are of the opinion that the properties in question *are not so interrelated* as to warrant their consideration as a single unit."

Defendants next contend that the trial court erred in refusing to allow defendants to introduce five or six ordinances which showed that recently rezonings of property of a comparable use directly across the street had occurred. They note that the only rezoning ordinance which was admitted showed a rezoning to B-5-1 and the jury could

reasonably infer that the other exhibits offered probably related to identical matters. They further note that the allowance of those exhibits "not only would have substantiated Gardner's testimony but showed what usages the city felt were then presently available to the property and further, would have substantiated the testimony of each of defendants' witnesses." They further note that the relevancy and materiality of the zoning ordinances should not be questioned.

Defendants further argue that counsel for plaintiff remarked to the jury that no attempts at rezoning were made until the Board of Education sought to take the property. They note that the excluded exhibits would have contradicted these assertions. Authorities cited include *Lombard Park District* v. *Chicago Title & Trust Co.*, 103 Ill. App. 2d 1, 242 N. E. 2d 440 (1968), and *Dept. of Public Works* v. *Rogers*, 39 Ill. 2d 109, 233 N. E. 2d 409 (1968).

In *Lombard Park District* v. *Chicago Title & Trust Co.*, it is stated (p. 8):

> "Without opening wide the floodgates for such testimony, courts have usually taken the view that a prospective purchaser, on the open market, on a proper showing that a change in zoning was reasonably probable in the reasonably near future, would consider the probability of such change in valuing the property, and that courts in condemnation proceedings should also receive such evidence."

In *Dept. of Public Works* v. *Rogers, it is stated* (p. 114):

> "Were the zoning ordinance inflexible, the trial court could very well have concluded that there was no probability of rezoning. However, the ordinance was proved to be flexible and there was sufficient basis for its introduction in evidence in support of the reasonable probability of the rezoning theory. The fact that the rezoning of the fifty-acre tract was for a different

> purpose and for a much larger area does not destroy its admissibility on the basis that it was irrelevant and immaterial."

Plaintiff contends that the excluded ordinances (defendants' Exhibits 2 through 6) were concerned with an area entirely different from that in which the subject parcels are located and were mostly R-4 zoning for multi-apartment and business uses. We agree with plaintiff's assertion that "defendants were not thereby deprived of their right to show a theory of reasonable probability of rezoning Parcels B, C and D for the reasons that (1) all the defendant's witnesses were permitted to testify to valuations of the condemned property on the basis of a change in zoning there from R-2 to R-4; (2) both the owner Kobelinski and the witness Schorsch testified for defendants to actual rezonings west of Cumberland from R-2 to R-4 to business; (3) a rezoning ordinance of property at the northeast corner of Bryn Mawr and Cumberland, defendants' Exhibit 7, was admitted into evidence; (4) in his final argument to the jury defendants' attorney repeatedly referred to these rezonings on the west side as evidence to be considered on the defendants' theory that there was a reasonable probability of securing rezoning of the subject parcels which he argued emphasized the correctness of the valuation testimony given by the defendants' witnesses based on R-4 zoning."

We conclude that *defendants were not prejudiced* by the court's exclusion of their zoning exhibits. They were in fact *permitted to present their theory* of a reasonable probability of rezoning to the jury. We find no error here.

Defendants next contend that the court erred in refusing to allow into evidence a sale of a one and one-half acre tract zoned R-1 in the area. The record shows that this parcel was not comparable to the parcels involved in the condemnation suit. We find no error here.

Defendants further contend that permitting petitioner to introduce a sale during cross-examination over objection and to introduce a sale upon rebuttal over objection where no contract was produced or foundation of similarity established are further examples of error prejudicial to defendants. We have examined the record and find these parcels had sufficient similarity for the court to permit counsel for plaintiff to go into the sales on cross-examination. Also, the terms and conditions of the contract of sale were not important. The only important thing was when the land was sold and what it was sold for. *Forest Preserve Dist.* v. *Kean,* 298 Ill. 37, 131 N. E. 117 (1921). We find no error here.

In *City of Evanston* v. *Piotrowicz,* 20 Ill. 2d 512, 170 N. E. 2d 569 (1960) it is stated (p. 522):

> "As we have also stated in the past, no fixed or general rule has or could be laid down which governs the degree of similarity that must exist between the properties sold and that condemned to make evidence of the sale or sales admissible; rather, the admissibility of such evidence must in each instance be determined by the trial judge within the proper limits of his discretion."

Defendants further contend that they were improperly denied leave to file a petition by which they sought to establish a new date for valuation of the premises for the condemnation trial. The petition essentially alleged that since the time of the petition on July 14, 1965, until the time for trial, February 3, 1969, the market value of all the property in the vicinity of the subject parcels had substantially increased. Defendants assert that "the petition raised a serious question as to whether using a date of July 14, 1965, under the circumstances of this case would constitute just compensation within the meaning of the constitutional mandate." Defendants' authorities include

Sanitary District v. *Chapin,* 226 Ill. 499, 80 N. E. 1017 (1907), and *Illinois Cities Water* v. *City of Mount Vernon,* 11 Ill. 2d 547, 144 N. E. 2d 729 (1957). In *Sanitary District* v. *Chapin,* it is stated (p. 504):

> "The rule so established, that the value of property is to be fixed as of the date of filing the petition, has been consistently followed ever since. * * * The filing of the petition is the first actual step toward devoting property to a public use, and in ordinary cases that time is as fair and just to both parties for fixing the value of the property as any that could be adopted. At any rate, the rule is firmly established; but if it should be applied to a case like this, where the owner has not been brought into court and no steps have been taken for several years, during which the proprety has greatly advanced in value, it would result in wrong and injustice."

Plaintiff, on the issue of the proper valuation date to be used here, asserts that the trial court rule correctly followed the long-established rule and procedure in Illinois. In *City of Chicago* v. *Riley,* 16 Ill. 2d 257, 157 N. E. 2d 46 (1959), it is said (p. 264):

> "It is well settled that the value of the property must be determined as of the time of filing the petition for condemnation."

In *City of Chicago* v. *Blanton,* 15 Ill. 2d 198, 154 N. E. 2d 242 (1958), it is stated (p. 202):

> "It is of course elementary that eminent domain proceedings were designed to afford the property owner a means by which he would receive in money the full, fair cash market value of the condemned land under the conditions which existed, not at time of trial, but at the time the eminent domain proceedings were instituted."

We find that *defendants have not asserted sufficient facts* to entitled them to a new valuation date. Defendants' cases

are distinguishable on their facts. The record indicates that the attorneys for both sides have tried to expedite the proceedings as much as possible and within their professional responsibilities to their clients.

Defendants next contend that the jury was influenced by passion and prejudice as exemplified by the statements of counsel for plaintiff in closing argument. *We find no merit in this contention.* The remarks made in *County of Cook* v. *Colonial Oil Corp.*, 15 Ill. 2d 67, 153 N. E. 2d 844 (1958), apply here. There the court stated (p. 75):

> "Counsel for defendant also characterizes the closing argument of petitioner's counsel as 'unfair, insulting, full of ridicule of respondent's witnesses and counsel, and so insinuating and vindictive as to be highly prejudicial to the respondent.' First of all, counsel for defendant, who is admittedly experienced in condemnation, made no objection to any of the opening argument of counsel for petitioner and no objection to any of the supposedly objectionable remarks made by petitioner's counsel in his final argument. We have consistently held that experienced counsel cannot take a chance of failing to make objections and then, upon receiving what they consider an adverse jury verdict, claim error."

Defendant finally contend that the cumulative errors denied defendants a fair trial. They assert that "the jury verdicts were approximately $10,000 or so less than in the first trial from which the plaintiffs originally took an appeal. The extreme prejudice which occasioned such a low verdict is confirmed by plaintiff's earlier attempting to waive a retrial after these defendants' motions to dismiss were over-ruled and return again to the jury verdict in 1966 from which they had originally taken an appeal."

After examining this record, we believe defendants received a fair trial on the proper issues *without prejudicial*

error, and the verdict was within the range of the testimony. In *School Trustees* v. *LaSalle National Bank,* 21 Ill. 2d 552, 173 N. E. 2d 464 (1961), our Supreme Court said (p. 556):

> "This court has repeatedly held that where the jury has viewed the premises and the amount fixed is within the range of the evidence, the verdict of the jury will not be disturbed unless the record clearly shows that it has been influenced by passion or prejudice or unless there was a clear and palpable mistake."

These remarks apply here, and the judgment of the trial court is affirmed.

AFFIRMED.

BURMAN, *P. J.,* and ADESKO, *J.* concur.

THE EMINENT DOMAIN ACT OF ILLINOIS.

(Chapt. 47, State Bar Association Edition, 1965, Vol. 1) p. 2027.

1. Compensation—Jury.] § 1. Private property shall not be taken or damaged for public use without just compensation; and that in all cases in which compensation is not made by the state in its corporate capacity, such compensation shall be ascertained by a jury, as hereinafter prescribed. Where compensation is so made by the state either party upon application may have a trial by jury to ascertain the just compensation to be paid. Such demand on the part of the state shall be filed with the state's petition for condemnation. Where the state is petitioner a defendant desirous of a trial by jury must file a demand therefor on or before the return date of the summons served on him or fixed in the publication in case of defendants served by publication. As amended by act approved July 11, 1957. L. 1957, p. 2603.

2. Proceedings—Parties.] § 2. Where the right to take private property for public use, without the owner's consent or the right to construct or maintain any public road, railroad, plankroad, turnpike road, canal or other public work or improvement, or which may damage property not actually taken has been heretofore or shall hereafter be conferred by general law or special charter upon any corporate or municipal authority, public body, officer or agent, person, commissioner or corporation and the compensation to be paid for or in respect of the property sought to be appropriated or damaged for the purposes above mentioned cannot be agreed upon by the parties interested, or in case the owner of the property is incapable of consenting, or his name or residence is unknown, or he is a nonresident

of the state, the party authorized to take or damage the property so required, or to construct, operate and maintain any public road, railroad, plankroad, turnpike road, canal or other public work or improvement, may apply to the circuit court of the county where the property or any part thereof is situated, by filing with the clerk a petition, setting forth, by reference, his or their authority in the premises, the purpose for which the property is sought to be taken or damaged, a description of the property, the names of all persons interested therein as owners or otherwise as appearing of record,if known, or if not known stating that fact and praying such court to cause the compensation to be paid to the owner to be assessed. If it appears that any person not in being, upon coming into being, is, or may become or may claim to be, entitled to any interest in the property sought to be appropriated or damaged the court shall appoint some competent and disinterested person as guardian ad litem, to appear for and represent such interest in the proceeding and to defend the proceeding on behalf of the person not in being, and any judgment or decree rendered in the proceeding shall be as effectual for all purposes as though the person was in being and was a party to the proceeding. If the proceeding seeks to affect the property of persons under guardianship, the guardians or conservators of persons having conservators, shall be made parties defendant, and if of married women, their husbands shall also be made parties. Persons interested, whose names are unknown, may be made parties defendant by the same descriptions and in the same manner as provided in other civil cases. Where the property is sought to be taken or damaged by the state for the purposes of establishing, operating or maintaining any state house or state charitable or other institutions or improvements, the petition shall be signed by the governor or such other person as he shall direct, or as shall be provided by law. No property belonging to a railroad or other public utility

subject to the jurisdiction of the Illinois Commerce Commission may be taken or damaged, pursuant to the provisions of this Act, without the prior approval of the Illinois Commerce Commission. As amended by act approved Aug. 24, 1965. L. 1965, p. ....., S. B. No. 563.

11. Cross petition.] § 11. Any person not made a party may become such by filing his cross petition, setting forth that he is the owner or has an interest in property, and which will be taken or damaged by the proposed work; and the rights of such last named petitioner shall thereupon be fully considered and determined (P. 2030).

SCHOOL CODE OF ILLINOIS.

(CHAPT. 122, STATE BAR ASSOCIATION 1965 EDITION VOL. 3, p. 217 & 221).

34—1. § 34—1. Application of Article—Definition of board. This Article applies only to cities having a population exceeding 500,000. "Board" when used in this Article, means board of education.

34—2. § 34—2. City to constitute district—Corporate status of board. Each city having a population exceeding 500,000 shall constitute one school district which shall maintain a system of free schools under the charge of a board of education. The district shall be a body politic and corporate by the name of "Board of Education of the City of ....." and by that name may sue and be sued in all courts and places where judicial proceedings are had.

34—20. § 24—20. Acquisition of real estate—Condemnation proceedings—Title—Conveyances. The board may acquire by purchase, condemnation or otherwise, real estate for any school purposes. Condemnation proceedings shall be conducted in the name of the city, in trust for the use of schools. The title to all real estate held for the use and benefit of the schools shall be held in the name of the city, in trust for the use of schools. All conveyances of real estate shall be made to the city in trust for the use of schools.

MOTION TO DISMISS.

Omitting caption, prayer and signature the motion of defendants as to Parcel B to be dismissed filed herein November 19, 1968 is as follows:

1. Plaintiff failed to prepare any preliminary plans for the construction of a school or to decide on what type of school it would construct on the proposed site.

2. Plaintiff, prior to the initiation of the instant suit, began a prior suit seeking to condemn a site slightly less than three acres of land in the immediate vicinity which was subsequently dismissed. Plaintiff also had initiated a suit prior to this instant suit, seeking to condemn a site of approximately 19 acres, also in the immediate vicinity. This second suit also was dismissed by the plaintiff prior to beginning this suit. By reason of the premises the attempt to take herein demonstrates an attempt to take an excessive amount of property.

3. No reports, surveys, or other basis for a recommendation for the taking, or reason why plaintiff should proceed differently in this suit from its proceedings in the two suits heretofore referred to, appear anywhere of record.

4. Plaintiff has failed to comply with an essential condition precedent to the filing of its petition herein in that it has failed to comply with the provisions of Section 11-12-4 of Chapter 24 of the Illinois Statutes.

5. Since plaintiff relies on the exceptions contained in Section 42 of Chapter 102 of the Illinois Revised Statutes relating to Meetings of Public Agencies to keep from the record any information which enters into its purported exercise of discretion to acquire the real estate here in-

volved, their failure to comply with the duties of the statute requiring their reference to the Chicago Plan Commission constitutes an abuse of power and prevents any reasoned decision or check or balance on the administrative actions of the Board of Education as plaintiff herein. It further prevents any review which might serve to uncover issues which were ignored or inadequately treated by the Board of Education; and refuses to this defendant the constitutional and statutory protections intended by the Illinois Legislature in the Plan Commission Statute. As a result thereof, this defendant is deprived of due process in that there is a complete absence of any review of plaintiff's decision to take this property.

JUDGMENT ORDER OF TRIAL COURT.

Omitting caption and signature, judgment order of court entered herein filed February 11, 1969, is as follows:

This Matter coming on for hearing upon the petition of the City of Chicago in Trust for the Use of Schools, for the ascertainment of the just compensation to be made for the taking by the said petitioner of the fee simple title to the real property described in said petition, and the petitioner, City of Chicago in Trust for the Use of Schools, appearing by James W. Coffey and Frank S. Righeimer, its attorneys;

And it appearing to the Court that all parties defendant herein have been served with process in the manner and form as provided for by statute or have duly entered their appearances;

And the Court having jurisdiction of all the parties defendant to this suit and the subject matter thereof, and all parties interested being before the Court, and the Court

being fully advised in the premises, and having ordered that a separate trial be had as to the real property described in the petition to condemn herein as to Parcels B, C and D, it was ordered that a jury come, whereupon came the jurors of good and lawful men and women, who having been duly selected, examined and sworn, well and truly to ascertain and report the just compensation to be made to the owner or owners of any party or parties interested in the premises sought to be taken by these proceedings, and to each person interested therein, according to the facts in the case as they have been made to appear from the evidence, and having heard the evidence adduced herein, the arguments of counsel, instructions from the Court, bring in their verdict and say:

"We, the jury, impaneled and sworn in the above entitled cause, do find and report that we have ascertained and determined the just compensation to be paid by the petitioner to the owner or owners of and party or parties interested in the real property hereinafter described, together with the improvements thereon, which said petitioner seeks to acquire, as stated in its petition filed in said cause. Said compensation is as follows:

"To the owner or owners of and party or parties interested in:

Parcel B.

The North Two Hundred Thirty-seven (237) feet of the South Eight Hundred Seventeen and Forty-seven one hundredths feet (817.47) feet of Lot Six (6) of the Subdivision of James Pennoyer's Estate in Sections One (1), Two (2), Eleven (11) and Twelve (12), Township Forty (40) North, Range Twelve (12), East of the Third Principal Meridian, excepting therefrom the West Fifty-five feet (55) taken for street, also excepting therefrom the East one Hundred Eighty-three and Seventy-two one hundredths feet (183.72) of

the West Four Hundred Seven and Forty-four one hundredths feet (407.44) of the South One Hundred eighteen and Fifty-five one hundredths feet (118.55) of the North Two Hundred thirty-seven feet (237) of the South Eight Hundred Seventeen and Forty-seven one hundredths feet (817.47) of said Lot Six (6), all in Cook County, Illinois

together with the improvements thereon, and all private interests in so much of the public streets and alleys as in anywise abut the said lands and premises, as fully compensation to the owner or owners of and party or parties interested in the said real property, for the fee simple title to the aforesaid real property, for the improvements thereon, and for all private interests in the streets and alleys which abut the said real property, the sum of One Hundred Sixty Five Thousand Dollars ($165,000.00).

"To the owner or owners of and party or parties interested in:

Parcel C.

The South half of the North Two Hundred Thirty-seven and three one hundredths feet (237.03) of the South one Thousand Fifty-four and fifty one hundredths feet (1054.50) of Lot Six (6) (except the West Fifty-five feet (55) thereof) in the Subdivision of James Pennoyer's Estate in Sections One (1), Two (2), Eleven (11) and Twelve (12), Township Forty (40) North, Range Twelve (12), East of the Third Principal Meridian, in Cook County, Illinois

together with the improvements thereon, and all private interests in so much of the public streets and alleys as in anywise abut the said lands and premises, as full compensation to the owner or owners of and party or parties interested in the said real property, for the fee simple title to the aforesaid real property, for the improvements thereon, and for all private interests in the streets and

alleys which abut the said real property, the sum of Ninety-Two Thousand Dollars ($92,000.00).

"To the owner or owners of and party or parties interested in:

Parcel D.

The North half of the North Two Hundred Thirty-seven and three one hundredths feet (237.03) of the South One Thousand Fifty-four and Fifty-one hundredths feet (1054.50) of Lot Six (6) (excepting therefrom the West Fifty-five feet (55) in the Subdivision of James Pennoyer's Estate in Sections One (1), Two (2), Eleven (11), and Twelve (12), Township Forty (40) North, Range Twelve (12), East of the Third Principal Meridian, in Cook County, Illinois

together with the improvements thereon, and all private interests in so much of the public streets and alleys as in anywise abut the said lands and premises, as full compensation to the owner or owners of and party or parties interested in the said real property, for the fee simple title to the aforesaid real property, for the improvements thereon, and for all private interests in the streets and alleys which abut the said real property, the sum of Ninety Two Thousand Dollars ($92,000.00).

"And we the jury, find that the payment of the said amounts to be paid to the owner or owners of and party or parties interested in said real property will fully compensate said owner or owners of and party or parties interested for the taking by said petitioner of the real property aforesaid, for the uses and purposes set forth in the petition filed in said cause." Which verdict is signed by each and all of the jurors aforesaid.

Whereupon the said petitioner moves for judgment on said verdict and the said defendants being present in the court, and all persons interested being before the court, and the court being fully advised in the premises;

DOTH CONSIDER, ORDER AND ADJUDGE that the sums of money awarded by the jury in and by their verdict to the owner or owners of and party or parties interested in said real property described in said verdict and in the petition filed herein, is just compensation to the owner or owners thereof and party or parties interested therein for the taking of the fee simple title to said real property, and judgment is herein entered accordingly.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the court that the Petitioner, within one hundred eighty (180) days from the entry of this order pay to the County Treasurer of Cook County, Illinois for the benefit of the owner or owners of and party or parties interested in said real property hereinabove described as Parcels B, C and D, the sum of Three Hundred Forty-Nine Thousand Dollars ($349,000.00) plus Forty-Four Dollars ($44.00) as costs of suit plus interest at the rate of 5% from the day the verdict of the jury was returned, February 7, 1969 until date of payment of award, as full compensation for the taking of the fee simple title to the said real property described in the petition to condemn herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED upon said payment to the County Treasurer of Cook County, Illinois, that the petitioner City of Chicago in Trust for the use of Schools, may enter in and upon the above described lands and premises, to wit: Parcels B, C and D and the petitioner thereupon shall become vested with the fee simple absolute title to said real property.

ENTER:

.....

Judge

Dated: February 7, 1969.

PETITIONERS' NOTICE OF APPEAL FILED IN THE TRIAL COURT.

Omitting caption and signature Notice of Appeal defendants filed herein April 11, 1969, is as follows:

I. Now come National Bank of Albany Park in Chicago as Trustee under Trust No. 11-1030, and as Successor in Interest to Exchange National Bank of Chicago as Trustee under Trust No. 15166; and La Salle National Bank of Chicago as Trustee under Trust No. 35232, Successor in Interest to John Przywara and Josephine Przywara, his wife, defendants-appellants herein, and hereby appeal from the judgment orders as to Parcels B, C, and D herein dated February 7, 1969, and entered February 11, 1969, wherein compensation was fixed for each of said parcels. Said defendants-appellants further appeal from the order entered March 14, 1969, denying their post-trial motion wherein they sought a new trial. Said defendants-appellants further appeal from orders entered herein:

a) denying said defendants-appellants their leave to file a cross petition herein;

b) denying said defendants-appellants their right to have damages assessed in these proceedings to their contiguous property;

c) striking certain portions of their motions to dismiss and denying the requested leave to amend said stricken portions;

c) over-ruling and denying the motions to dismiss of said defendants-appellants after hearing thereon.

II. Said defendants-appellants respectfully pray:

a) that the court find on the basis of the record herein, that the plaintiff, Board of Education of the City of Chicago, denied due process to these defend-

ants-appellants within the meaning of the Fourteenth Amendment to the Constitution of the United States and of Article 2, Section 2, of the Constitution of the State of Illinois.

b) alternatively, that this court reverse the ruling of the trial court over-ruling and denying the motions to dismiss of said defendants-appellants and sustain said motions and remand the cause to the trial court for such further relief as may be required.

c) as a further alternative, that this court reverse the trial court ruling striking certain portions of said motions and remand the cause for hearing on paragraphs 1, 3, 4 and 5 of said motions to dismiss for such further proceedings as may be required.

d) as a further alternative, that this court order a new trial be awarded the said defendants-appellants wherein damages, to be fixed by the verdict of a jury, be awarded to these defendants-appellants for their contiguous property not sought to be taken in these proceedings, in accordance with the mandate of Article 2, Section 13, of the Constitution of the State of Illinois.

e) as a further alternative, that a new trial be awarded to these defendants-appellants herein and the trial court be directed to fix a date subsequent to the date of the filing of the petition herein for evaluation of the premises sought to be taken and evaluation of the damages occasioned to the defendants-appellants contiguous property, so as to comply with the mandate of Article 2, Section 13, of the Constitution of the State of Illinois.

f) as a further alternative, in the event the court does not order a different date for valuation of the premises taken and damaged, that the court rule that the provisions of Section 1 of the Laws of 1963, page

1591, as added by act of the legislature dated July 15, 1963 (120 Ill. Rev. Stat. Sec. 508A) relating to the date of liability for taxes be held unconstitutional as it applies to the defendants-appellants herein, as a taking of property of said defendants-appellants without just compensation.

g) as a further alternative, that this court award said defendants-appellants a new trial and remand to the trial court on the grounds that errors in the admission and rejection of proffered evidence, proffered instructions and in permitting argument by plaintiff's counsel which was prejudicial to these defendants-appellants in the course of the proceedings, which prevented said defendants-appellants from receiving a fair trial.

NOVEMBER 1962 AGREEMENT.

Agreement by which petitioners had acquired all right, title and interest to Parcel C prior to initiation of case in March, 1965, were in possession, collecting rents on all property and under which acquired record legal title to Parcel D during suit.

AGREEMENT.

"THIS AGREEMENT, dated the 20th day of November, 1962, is entered into by and between Walter S. Branda and Florence P. Branda, his wife, hereinafter referred to as Sellers, and Ted Szywala and Mitchell P. Kobelinski, hereinafter referred to as Buyers.

WHEREAS Sellers are the lawful owners of the following described real estate:

The North 237.03 feet of the South 1054.50 feet of Lot 6 (except the West 55 feet thereof) in Subdivision of estate of James Pennoyer in Sections 1, 2, 11 and

12, Township 40 North, Range 12, East of the Third Principal Meridian, in Cook County, Illinois.

and

WHEREAS Buyers have expressed a desire to purchase the afore-described real estate for the sum of $143,500.00 and to resubdivide and develop same:

NOW, THEREFORE, It is expressly agreed as follows:

1. Simultaneously with the execution of this Agreement, Buyers have paid and delivered the sum of $8,500.00, receipt of which is hereby acknowledged by the Sellers.

2. Sellers will immediately cause title to the above described real estate to be conveyed by Warranty Deed in Trust to The Exchange National Bank of Chicago as Trustee under its customary form of "land trust agreement", with the Sellers designated as the beneficiaries of the said trust.

3. Sellers will immediately make application for a Report on Title issued by the Chicago Title and Trust Company for the purpose of showing good and merchantable title to the said property in the Exchange National Bank of Chicago, as Trustee, under the trust agreement made pursuant to paragraph 2 above, subject only to the following:

(a) Special taxes or assessments for improvements not yet completed;
(b) General taxes for the year 1962 and subsequent years;
(c) Building, building line and use or occupancy restriction conditions and covenants of record;
(d) Zoning and building laws or ordinances;
(e) Standard objections contained in its Owners Title Guarantee policies.

If the report on title discloses any defects in title (other than such usual objections contained in Owners' policies

and the matters to which this sale is subject by the terms hereof), Sellers may cure such defects. If such defects in title be not cured within 60 days from the date of the preliminary report on title, this contract thereupon shall, at the option of the Buyers, become null and void and the initial payment of $8,500.00 shall be returned to Buyers and the liability of the Sellers is hereby limited only to the return of said $8,500.00. However, Buyers may elect to take the title as it then is, with the right to deduct from the purchase price liens or encumbrances of a definite or ascertainable amount. Simultaneously with the delivery of report of title, Sellers shall deliver a Plat of Survey.

4. In the event title is found to be good and merchantable, or is acceptable to the buyers, then the Buyers shall within ten days thereafter pay the additional sum of $15,000.00 plus $550.00 for two gas space heaters and one Admiral refrigerator now on the subject premises, and the Sellers shall simultaneously with such payment execute an irrevocable direction to the said Trustee to issue Trustee's Deeds only on the written direction of the Buyers under the following terms and conditions:

(a) On or before May 1, 1963, but not prior to January 1, 1963, the Buyers shall have the right to direct the Trustee to issue its Trustee's Deed conveying the Southwest one-quarter of the subject premises.

(b) On or before May 1, 1964, but not prior to January 1, 1963, the Buyers shall have the right to direct the Trustee to convey the Southeast one-quarter of said property.

(c) On or before May 1, 1965, but not prior to January 1, 1964, the Buyers shall have the right to direct the Trustee to convey the Northeast one-quarter of said property.

(d) On or before May 1, 1966, but not prior to January

1, 1964, the Buyers shall have the right to direct the Trustee to convey the remaining property in said trust.

(e) Each of the foregoing directions to convey shall be honored by the Trustee only if accompanied by a certified or cashier's check payable to the order of the Sellers in a sum equal to $30,000.00 plus interest at 5½% on the total amount of installment payments then remaining unpaid. Interest on the original payment shall be computed from January 1, 1963, and interest on all subsequent payments shall be computed from the day of the last payment received by the Trustee. All such payments received by the Trustee shall be immediately forwarded to the Seller.

5. General real estate taxes for the year 1962 shall be paid by the Sellers. General real estate taxes and fire insurance for the years 1963 and subsequent years shall be paid by the Buyers.

6. After the payment of the additional sum of $15,000.00 as required by paragraph 4, the Buyers shall thereafter have the legal right to possession of the premises and the right to any income accruing therefrom, but shall not have the right to remove or substantially modify any of the improvements on said premises, nor commence any construction activity thereon other than surveys and soil tests.

7. After the Buyers have acquired the first portion of said real estate, they shall thereafter have the right to direct the Trustee to execute a Plat of Subdivision covering the property so acquired together with any property still remaining in the trust, dedicating such portion of said property as may be necessary for the creation, extension or widening of streets and alleys and for the dedication of easements for public utilities, provided, however, that the dedication of any portion of land for public use for which payment has not theretofore been made shall not exempt the Buyers from payment for such land.

8. After the Buyers have acquired the first portion of said real estate, they shall thereafter have the right to enter into contracts for surface and underground site improvements such as streets, alleys, sewers, etc., on the property so acquired and on the property still remaining in the trust, provided, however, that each and every contract for site improvements on the property still remaining in the trust shall contain an express, full and complete waiver and release of any and all liens or claims or rights of lien against the property still remaining in the trust, and provided a signed copy of each and every such contract together with the plans and specifications are promptly delivered to the Sellers before work begins; in the alternative, Buyers may furnish at their own expense a bond in an amount equal to the cost of the improvements.

9. Buyers further agree that under no circumstances will they be entitled to any reimbursement from Sellers for surface or underground improvements made upon said tract of land or any portion thereof.

10. Before demolishing any buildings on the subject premises, the Buyers shall give the Sellers 30 days written notice of their intention to demolish, and the Sellers shall have the right in such intervening time to remove such fixtures, storm windows, storm doors, cabinets and other salvable materials from said property as they desire, including trees and shrubs, which may be removed at any time.

11. Sellers will provide Buyers with the customary form of Chicago Title and Trust Company Title Insurance Policy. A Policy or Preliminary Report on Title is to be delivered for an amount equivalent to the sum paid the Trustee within ten days of the issuance of the Deed by the Trustee covering the separate parcels of real estate conveyed by the Trustee at the time.

12. All Trustee's fees in connection with said Trust

Agreement shall be paid by Buyers. Buyers shall pay all costs for surveys, preparation of Plats of Subdivision and recording, and shall furnish copies thereof to Sellers.

13. The several deposits of money to be made by Buyers with the Trustee as hereinabove set forth shall be deposited within the time stated, as time is of the essence of this contract. In case of default in making any such deposits of money when due as herein specified, and such default shall continue for 15 days beyond each respective due date, this agreement shall thereupon be terminated and of no further force or effect. All monies theretofore deposited or paid to Sellers shall be retained by Sellers as either payment for real estate theretofore conveyed or as liquidated damages, and Buyers shall be released from the obligation to purchase any or all of the remaining real estate and to make any additional deposits of money on same. Whatever real estate shall remain in the name of the Trustee shall be free and clear of any direction by Buyers, and all rights of Buyers to direct the Trustee to convey any part or all of the real estate or lots shall be revoked, shall cease and be of no force, effect or validity whatsoever, and Sellers alone shall be vested with the right, power and authority to direct the Trustee in making of deeds for or to otherwise deal with the title to said real estate.

14. No waiver of a breach of any term or condition shall be waiver of any other or subsequent breach of the same or of any other term or condition.

15. All notices and demands herein required shall be in writing. The mailing of a notice by certified mail to the Sellers c/o Edward S. Coath, 29 South LaSalle Street, Chicago, Illinois, or to the Buyers at 5345 North Harlem Avenue, Chicago 31, Illinois, shall be sufficient service thereof.

IN WITNESS WHEREOF the parties have hereunto set their hands and seals on the aforementioned date."